IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 53

GANGE LUMBER COMPANY, *Appellant*;

vs.

RALPH ROWLEY and DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, *Appellees.*

APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON.

REPLY BRIEF OF APPELLANT

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1. There Is No Statutory Interpretation by the Court Below Which Disposes of this Case.

It was contended by the appellant in the Washington Supreme Court that the 1941 amendment should be interpreted only as extending the time for applying to reopen cases where the right to reopen had not become barred prior to the effective date of the amendment, but should not be interpreted as applying retroactively to permit reopening where the time therefor had expired. The Washington Supreme Court, however, interpreted the 1941 amendment against the appellant's contention.

This, of course, is a true interpretation, which is

binding on this court. The appellee Department urges, however, that the Court below interpreted the statute as "applying to the remedy and not the right", and that this "interpretation" is binding here and is an independent state ground upon which the decision below can be rested.

But this conclusion of the Washington Supreme Court is a *statement of a result*, not an interpretation (or statement of the meaning) of the statute. If the Washington Supreme Court could thus purport to prevent an inquiry into the constitutionality of this statute, then the jurisdiction of this court in constitutional matters could be divested completely by the decisions of the courts of last resort about the country.

The very question in issue in this case, upon constitutional considerations, is whether the *result* of the 1941 amendment was to affect the substantial rights and liabilities of the parties, or was to relate only to procedural matters. The Washington Supreme Court's decision that only a procedural matter was involved, was a decision squarely on the constitutional question involved and was not a mere interpretation of the statute. It is the province of this court to regard the *substantive nature and result* of the litigation and its *effect* upon the federal right asserted (see the authorities at page 45 of our opening brief).

2. Jurisdiction Is Clear.

There is no independent state ground upon which the decision below can be rested. It is stated, however, at page 11 of the appellee Department's brief, that the first decision of the Washington Supreme Court "foreclosed all questions" in the case, with the intimation,

apparently, that the first decision below was a final judgment and that the second decision, from which the present appeal is taken, was not an appealable judgment.

Upon the first decision below it was held that the 1941 amendment was not unconstitutional and that the appellee Department had therefore improperly denied a hearing upon the merits of the appellee Rowley's application for additional compensation, and the effect of the decision was to remand the case to the Department for the purpose of holding a hearing upon the merits of the application. (R. 7, 9, 10, 13, 20, 21, 22, 23.)

Up to that point it was unknown, of course, whether any aggravation of the appellee Rowley's disability had in fact occurred and whether, assuming the validity of the 1941 amendment, he would be entitled to further compensation. Obviously, therefore, the first decision was not appealable and no final judgment was entered until after the case was adjudicated on the merits and until the Supreme Court of Washington, upon the second decision, had affirmed the appellee Department's order directing payment of additional compensation. (R. 24, 25, 26, 27, 32, 38, 44.)

Georgia Railway Co. v. City of Decatur, 262 U.S. 432;

City of Paducah v. East Tenn. Tel. Co., 229 U.S. 476;

McGourkey v. Toledo & O. C. R. Co., 146 U.S. 536;

Mower v. Fletcher, 114 U.S. 127;

Ex Parte Norton, 108 U.S. 237;

Grant v. Phoenix Mut. L. Ins. Co., 106 U.S. 429;

Bostwick v. Brinkerhoff, 106 U.S. 3.

The opinion on the second appeal below stated that the court's first decision had become "the law of the case", and the court therefore refused to pass upon the constitutional question a second time. But, of course, the phrase "the law of the case" refers only to the practice of courts generally to refuse to reopen what has been decided and obviously cannot limit the power of this court; rather, after the case is adjudicated on the merits and a final judgment is entered upon the second appeal, this court will search the entire record in its inquiry into the constitutional question.

Davis v. O'Hara, 266 U.S. 314;

Georgia Railway Co. v. City of Decatur, *supra*, 262 U.S. 432;

Grays Harbor County v. Coats-Fordney, 243 U.S. 251;

Messinger v. Anderson, 255 U.S. 436;

King v. West Virginia, 216 U.S. 92.

3. The Interest of the Appellant Is Clear.

It is suggested at pages 16 and 17 of the appellee Department's brief that no evidence was introduced in any of the proceedings below, and that it does not appear from the record that the appellant is now a contributor to the accident fund, or will be a contributor in the month of September following the final payment of the new award, or that the appellant will not then be over the maximum premium rate (with the infer-

ence, therefore, that the additional award would have no effect upon the appellant's actual premium rate).

These suggestions do not accord with the nature and operation of the Industrial Insurance Law. It appears conclusively from the record that the appellant was the employer at the time of the injury, to whose cost experience the new award would therefore be chargeable, and was the party served with notice, as required by law, of the present proceedings before the appellee Department for the reopening of the appellee Rowley's claim, including, particularly, the award of additional compensation. (R. 1-10)

The result of the decision below, if unappealed, would be to require the appellee Department forthwith to charge the amount of the additional award to the appellant's cost experience under the law. (Remington's Revised Statutes, Supplement, Section 7676.) This is an immediate, accrued *liability* which would be payable during the five-year period ensuing after the September first following the date the award would become final. It is the 1941 amendment, and the judgment of the Supreme Court of the State of Washington in aid of the statute, requiring this charge and liability which deprives the appellant of its property without due process of law.

It is idle to speculate whether the appellant might go out of business in the ensuing five-year period, or whether in some year during that period some catastrophic set of circumstances should force the appellant's actual premium rate to the maximum rate. The *liability* for increased premiums attaches forthwith upon the finality of the award. The judgment of the

Supreme Court of Washington requiring this result, in the absence of the present appeal, would be *res judicata* of the validity of the charge against the appellant's cost experience and the inclusion of the new award in the computation of the appellant's future premium rate. It is because of these circumstances that notice of an award made by the Department is required by the Law to be served upon the employer and why he is accorded the right of appeal to the courts (see the authorities at pages 35 to 38, inclusive, of our opening brief), and it was because of these circumstances that the Supreme Court of Washington in the present case was called upon to decide, and did decide, upon the constitutionality of the 1941 amendment.

[It might be noted in passing that a hearing before the Joint Board of the Department, the only tribunal where evidence may be introduced in a case of this kind, was denied on the two occasions when the matter came before that Board. R. 9, 32; Remington's Revised Statutes of Washington, Section 7697, and 1943 Permanent Supplement, Section 7697.]

4. The Authorities in the Appellee Department's Brief Are Not Persuasive

It is interesting to note that neither the *Danzer* case nor any of the cases upon which it is based is mentioned in the appellee Department's brief. *Chase Securities Corporation v. Donaldson* is cited and quoted from, but its careful distinction of the case itself, and of the *Danzer* case, from *Campbell v. Holt* is not considered in the Department's brief.

As stated in the *Donaldson* case, "In the *William Danzer & Co.* case it was held that where a statute in creating a liability also put a period to its existence, a retroactive extension of the period after its expiration amounted to a taking of property without due process of law."

Notwithstanding the statements in the Washington Supreme Court's opinion, and in the appellee Department's brief, to the effect that the 1941 amendment affected "only the remedy and not the right," it is unquestionably true that the Industrial Insurance Law created Rowley's right to additional compensation and the appellant's accompanying liability (our opening brief, page 15), that this right and liability terminated upon the lapse of three years (id., pages 16 to 25) and that the 1941 amendment is an attempt retroactively to extend the period after its expiration. This case, we submit, is squarely within the rule of the *Danzer* case and, as indicated by the careful opinion in the *Donaldson* case, is not within *Campbell v. Holt* where the usual rule that the general statute of limitations merely bars the common law remedy of a litigant was applied.

The cases cited in the appellee Department's brief do not persuade a different conclusion. *State ex rel. Griffen v. State Industrial Accident Commission*, 145 Or. 443, 28 P.(2d) 237, held merely that a judgment of the circuit court, upon appeal from the commission's original closing order, directing payment of monthly compensation for a period of 64 months did not prevent termination of compensation by the commission on its own motion, after its discovery that the bene-

ficiary had recovered completely from his disability within the 64-month period. The only question involved in the case was one of statutory interpretation. So also in *Montgomery v. Seneca Iron & Steel Co.*, 257 N.Y.S. 556, it was held, as a matter of statutory interpretation, that an amendment applied retroactively and, although *Campbell v. Holt* was mentioned in the opinion, no constitutional question was before, or decided by the court.

The amendment in *Paramino Lumber Company v. Marshall*, 309 U.S. 370, was a private act, for the benefit of a single individual, passed "to cure a defect in administration developed in the handling of a compensable claim." The Court said it was unnecessary in such a case to consider whether either *Campbell v. Holt* or the *Danzer* case applied. The 1941 Amendment in case at bar obviously was not such a private act, and the important distinction between *Campbell v. Holt* and the *Danzer* case was lately recognized in *Chase Securities Corporation v. Donaldson.*

In *New Amsterdam Casualty Co. v. Cardillo*, 108 F. (2d) 492, the court held explicitly that "Congress had the power to extend or contract the period of limitation as applicable to an indemnity claim *either pending or subsequently brought*," pointing out that "an award had been made (before the amendment to the statute), but the ultimate disposition of the case was still *undetermined and subject to change.* All the amendment did was to extend the time *for this purpose*" (emphasis supplied). And in *Ferguson Company v. Seaman*, 119 N.J.L. 575, 197 Atl. 245, the amendment to the statute applied to a case which was still

pending for final settlement, it being held that the due process clause did not prevent an extension of time for taking action upon a pending claim and that the extension of time did not impair the obligation of any contract between the workman and his employer. It has been conceded throughout the instant case that the 1941 amendment in question extended the time for applying to reopen claims not barred on the effective date of the amendment, and it is not asserted that an obligation of contract has been impaired by the amendment.

Mattson v. Department of Labor and Industries, 293 U.S. 151, and *Vincent v. Allerton House Company*, 256 N.Y. 522, 177 N.E. 25, are nothing more than applications of the familiar rule that a legislature may shorten the period of limitations so long as it leaves a litigant a reasonable period of time within which to assert his right. No legislative attempt was involved in either of these cases to revive an expired statutory right or to re-create an expired statutory liability.

5. The 1941 Amendment Did Not Merely Restore a Means of "Judicial Review"

As the brief of the appellee Department points out, the section of the Industrial Insurance Law in question, Section 5(h) thereof, originally authorized the filing of an application by a beneficiary for reopening of a claim and additional compensation without limitation as to time. The time limitation was first inserted, into this same section of the Law, in 1927.

The brief of the appellee Department then concludes

from this (page 21) that "the *right* of *judicial review* of such refusal [of the Department to reopen a claim] was withdrawn in 1927 if the claim had been closed for more than three years" and (page 20) that "The 1941 amendment here drawn in controversy * * * merely restores * * * the right of *judicial review* in the event the Department of Labor and Industries refused to allow such relief." (Italics supplied.)

This, of course, infers that from 1927 to 1941 the beneficiary had a *right* to file an application for reopening even though the three-year period had expired. It would then follow, since this right existed, that the Department was *obliged* to consider the application and award additional compensation if such was justified, *in the Department's judgment*, on the merits; but since the beneficiary had no means of judicial review, the Department might deny *any* application without recourse by the beneficiary.

Actually, since 1927 the Department has never been required to consider a late claim, and in fact the Department *has no power to do so*, should it be so inclined. *Nagel v. Department of Labor and Industries*, 189 Wash. 631, 66 P.(2d) 318; and see *MacVeigh v. Unemployment Compensation Commission*, 19 Wn. (2d) 383, 142 P.(2d) 900.

As the Supreme Court of Washington said in *Botica v. Department of Labor and Industries*, 184 Wash. 573, 52 P.(2d) 332, "the statute (after 1927) bars the *right* of the workman *to file an application*"; it did not give him a right to apply but simultaneously withhold the means of review. The insertion of the time limitation in 1927 did not merely suspend the

means of judicial review, pending the possible action of some future legislation; rather, a timely filing has always, since 1927, been jurisdictional (see the authorities at page 6 of our opening brief).

Section 5(h) of the Law has been codified since 1932 as Section 7679(h) of Remington's Revised Statutes of Washington. Section 20 is Section 7697 of the Code. The latter section, from the inception of the Law in 1911, has made elaborate provision for *judicial review* of decisions of the appellee Department. Under this section, a review of the Department's rejection of an application for reopening, regardless of the time of filing, was available from 1911 to 1927; and since 1927, a review, under Section 7697, of the Department, now lodged in its Director, was retained been, and still is available.

The brief of the appellee Department points out that Section 5(h) of the Law [now section 7679(h)] originally authorized the reopening of a claim by the Department *upon its own motion*. This power of the Department, now lodged in its Director, was retained in Section 5(h) in 1927 when the three-year limitation upon the *right* of the beneficiary was inserted into the section. The *right* of the beneficiary to demand reopening of his claim and the discretionary power of the Director have been recognized as being entirely independent one from the other, and the exercise of this discretionary power by the Director can be neither compelled nor reviewed, *Botica v. Department of Labor and Industries*, *supra*, 184 Wash. 573, 52 P.(2d) 332; *Smith v. Department of Labor and Industries*, 8 Wn.(2d) 587, 112 P.(2d) 57.

The appellee Department's brief observes correctly that it was held in the *Smith* case that the three-year time limitation does not apply to the Director's discretionary power under Section 5(h), but it is then reasoned (page 22) that the *Smith* case "demonstrates that no *right* is involved by the amendment now under attack, for had the legislature not enacted the challenged amendment the director, nevertheless has the power to reopen this and every other case and award additional compensation no matter when closed .The statute did not revive a dead claim." (Emphasis supplied).

This fails to observe the obvious distinction between the *right* of a beneficiary *to demand, and enforce* a grant of compensation and the *power* of the Director, *on his own motion*, to make a grant thereof. So far as this case is concerned, the Director's power would be no different were it vested in the Governor, or some other administrative agency, and the award, upon the exercise of the power, payable out of the general fund of the State. The Director's power is now a means wisely included in the Law to permit the reopening of an expired, but meritorious case, and to permit reopening and termination of further monthly compensation in the opposite sort of case. In the case at bar we are dealing with the *expired statutory rights* of beneficiaries and the correlative *expired statutory responsibilities* of employers; we are not dealing with the purely independent discretionary power of the Director.

It was held in the *Danzer* case than an expired statutory right and its accompanying liability cannot

be re-created after their expiration. The 1941 amendment is an attempt to do so.

Respectfully submitted;

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